IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

NOTICE OF MOTION NO. 2818 OF 2003

IN

SUIT NO. 2852 OF 2003

Kamlakar Ganpat Bhoir .....**Plffs.**
vs.
Mohammed Hanif Siddiqui
Haji Mohammed Sharif
and Ors. .....**Defnds.**

NOTICE OF MOTION NO. 2817 OF 2003
IN
SUIT NO. 2851 OF 2003

Kamlakar Ganpat Bhoir .....**Plffs.**
vs.
Mohammed Hanif Siddiqui
Haji Mohammed Sharif
and Ors. .....**Defnds.**

V.S. Kapse i/by P.S. Tiwari for the plaintiffs.
A.M. Saraogi for the defendants.

CORAM: S.U. KAMDAR, J.

DATE : 31st January,2006.

P.C. :.

1. These two Notices of Motions are initiated out by the plaintiff for interim relief of injunction restraining the defendants from in any manner alienating, encumbering or creating any third party rights inrespect of the suit property and alternatively appointment of Court Receiver has been prayed in the present case.

2. In view of the fact that it is an admitted position that the facts in the present suit are identical with the facts of Suit No. 2852 of 2003, a common finding is given in respect of both the Suits.

3. Some of the material facts of the present case are as under :

4. Under an agreement dated 5.8.1992 the defendant agreed to purchase the said property being land admeasuring 432 sq.yds, bearing Survey No. 86-A(part), CTS 510 of Village Nahur, Taluka Kurla, B.S.D. from the plaintiff on a total consideration of sum of Rs.2,80,800/-. The payment

was to be made as under :

a) Rs.20,000 (Rs. Twenty Thousand Only) on or before the execution hereof as earnest money.

b) RS.2,60,800/- (Rs. Two Lacs Sixty Thousand Eight Hundred) the balance amount on or before the execution of conveyance or within the period of one year which may be earlier.

5. In so far as the payment of Rs.20,000/- is concerned there is no dispute that the said payment was made. However there is dispute inrespect of further payment of Rs.2,60,800/- and to the extent to which the said payment is made. Under Clause 3 of the said agreement it was inter-alia provided that subject to the exemption granted by the ULC authorities the sale will be completed within a period of one year. Under Clause 13 of the agreement it was provided that if the deal is not completed due to default on the part of the purchaser the vendor shall be entitled to the specific performance of the said agreement. Under Clause 16 and 17 it is provided that the vendor will vacate the watchman who is occupying a room on the said plot of land and the purchaser can start

fencing of the plot and make rooms. It was further provided therein that the said government land and that the vendor shall provide 15 ft. access to the purchasers for the said land. Under the terms and conditions of the agreement the entire balance consideration of Rs.2,60,000/- was to be paid within a period of one year from the date of execution of the agreement or before the execution of the conveyance which ever is earlier.

6. It is a case of the plaintiff that the aforesaid balance amount was not paid by the defendant and thus the plaintiff has revoked and/or cancelled the agreement by letter dated 29.3.2001. On 9.4.2001 the defendant addressed a letter which is Ex.F to the plaint inter-alia admitting therein that the entire payment is not made and the defendant called a without prejudice meeting for negotiation and settlement of the said matter. It is the case of the plaintiff that infact the said meeting took place and ultimately the defendant pleaded for extension of time to make payment with interest at the rate of 18% p.a. However inspite

of the extension of time in a meeting held on 9.8.2001 the said payment was not made and thus ultimately the plaintiff has terminated the said agreement and filed the present suit for recovery of possession since the defendants were in possession in part performance of the said agreement for sale.

7. The learned counsel for the plaintiff has contended before me that in view of the fact that the plaintiff has terminated the said agreement the defendants have no right, title and interest in the suit property and therefore this court should appoint Court Receiver or alternatively grant injunction restraining the defendant from alienating, encumbering or creating any third party rights inrespect of the said land.

8. On the other hand the learned counsel for defendant has contended that the suit is barred by law of limitation. It has been contended that under the agreement Clause 2(b) thereof the payment was required to be made within one year from the

date of execution of the agreement. Thus the default of non-payment has occurred on 5.8.93 and therefore the cause of action has arosed on 5.8.1993 whereas the suit is filed in 2003. Firstly in my opinion though the aforesaid contention has no merits but even if it is accepted on face value the suit cannot be treated as barred by law of limitation. The suit is for recovery of possession. Under Article 65 of the Limitation Act the suit for possession can be maintained for a period of 12 years and thus when there is a suit for possession for the purpose of limitation Article 65 will apply and therefore the suit is within time. However apart from the aforesaid contention I am of the opinion that the argument that the cause of action has arose on 5.8.1993 has no merits because the cause of action to file the suit for recovery of possession which has been handed over in part performance of the agreement would only arise from the date of the termination of the agreement and admittedly the said termination is dated 29.3.2001 and subsequently as recorded in the letter dated 9.4.2001 the time was

extended by mutual agreement and therefore the final termination was effected only on failure to pay within the extended period of time i.e. 9.12.2001. The suit is lodged in this court on 30.4.2003 and therefore the suit is within time. In my opinion apart from the aforesaid issue of limitation is required to be determined at the hearing of the suit. Prima-facie the suit is not barred by the law of limitation.

9. The next contention urged by the defendants is that the plaintiff is in breach of the various terms and conditions of the agreement and thus the termination of the agreement is not valid and cannot be given effect to. In support of the said contention he has relied upon Clauses 16 and 17 of the said agreement and has contended that the defendant has not complied with the said obligations contained therein and therefore he was not liable to make payment under Clause 2(b) of the said agreement. It has been contended that in the light of the breaches committed by the plaintiff himself the suit based on termination is not valid.

In my opinion the aforesaid contention has also no merits. Firstly the liability to make the payment under Clause 1(b) of the said agreement is not attached or connected with the obligations of the plaintiff as conferred under Clause 16 and 17 of the said plaint. Admittedly till 5.8.1993 when the time to make payment of Rs.2,16,800/- expired the defendant never called upon the plaintiff to comply with the obligations as contained in Clause 16 and 17 thereof. Apart from the aforesaid even till date the defendant who is the purchaser has not filed the suit seeking performance of the agreement and completion of the sale which indicates that the defendant was not at all interested in completing the transaction and therefore the bogie of non-compliance with the obligation of the plaintiff is raised with a view to defeat the prayers of injunction made in the present Notice of Motion. Learned counsel for the defendant has contended that he being in possession of the property in part performance it was not necessary for him to file the suit for specific performance. In my opinion the contention is devoid of any merits. If the

agreement is terminated then his possession inrespect of the property is that of a tress-passer and his entitlement is only under Section 53A of the Transfer of Property Act. In a suit filed by the owner of the property the aforesaid defence of possession in part performance is not permissible in law and accordingly I reject the same.

10. This leads me to the last contention that the remedy under the agreement is provided of specific performance by the plaintiff and not of termination of the agreement. In support of the aforesaid contention the learned counsel for the defendant has relied upon Clause 13 of the said agreement.

> "13. If the deal is not completed due to wilful default on the part of the purchaser the vendor shall be entitled to the specific performance of this agreement by the purchaser."

11. Relying upon the aforesaid clause it has been contended that the agreement providing for consequence of breach only by specific performance

it is not open for the plaintiff to terminate the agreement and file the present suit. This contention also has no merits. The law prescribes that if the party has committed breach of the reciprocal terms and/or obligations conferred under the contract then in that event the party who has suffered by virtue of breach of the other party is entitled to terminate and/or revoke the contract and such right which is conferred by the statue cannot be taken away by Clause 13 of the said agreement. In any event Clause 13 does not preclude the plaintiff to terminate the agreement and file the suit for recovery of possession thereof. Clause 13 only provides for one of the mode and method of the relief to which the plaintiff entitled to. The aforesaid contention is accordingly rejected.

12. The last contention pertains to the amount paid under Clause 1(b). It is the case of the plaintiff that the outstanding amount is Rs.1,40,000/- as claimed by them in their letter dated 29.3.2001. On the other hand the learned

counsel for defendant has filed affidavit in reply. He has admitted in his reply that he has not made payment of the entire amount of Rs.2,16,800. According to him the balance amount outstanding is Rs.61,000/-. He has claimed certain adjustment of expenses. In my opinion prima facie case is made out by the plaintiff that the defendants is in breach of the terms and condition of the agreement by virtue of non-payment thereof and thus the prima-facie termination of the agreement is valid and legal. In that view of the matter it is necessary to pass necessary interim orders in the present Notice of Motion. In view of the fact that both matters are identical I grant both the Notices of Motions in terms of prayer clause (a) thereof. Both the motions are disposed off accordingly. No order as to costs.

sd/-

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